IN THE

Supreme Court of the United States

OCTOBER TERM—1945.

No. 963.

AGWILINES, INC., as owner of Steamship *Agwidale* and on behalf of any others interested in said vessel, her use and operation,

Petitioner,

against

Motorship *Eos Veronica*, her engines, etc., [illegible] & [illegible] Company, [illegible]

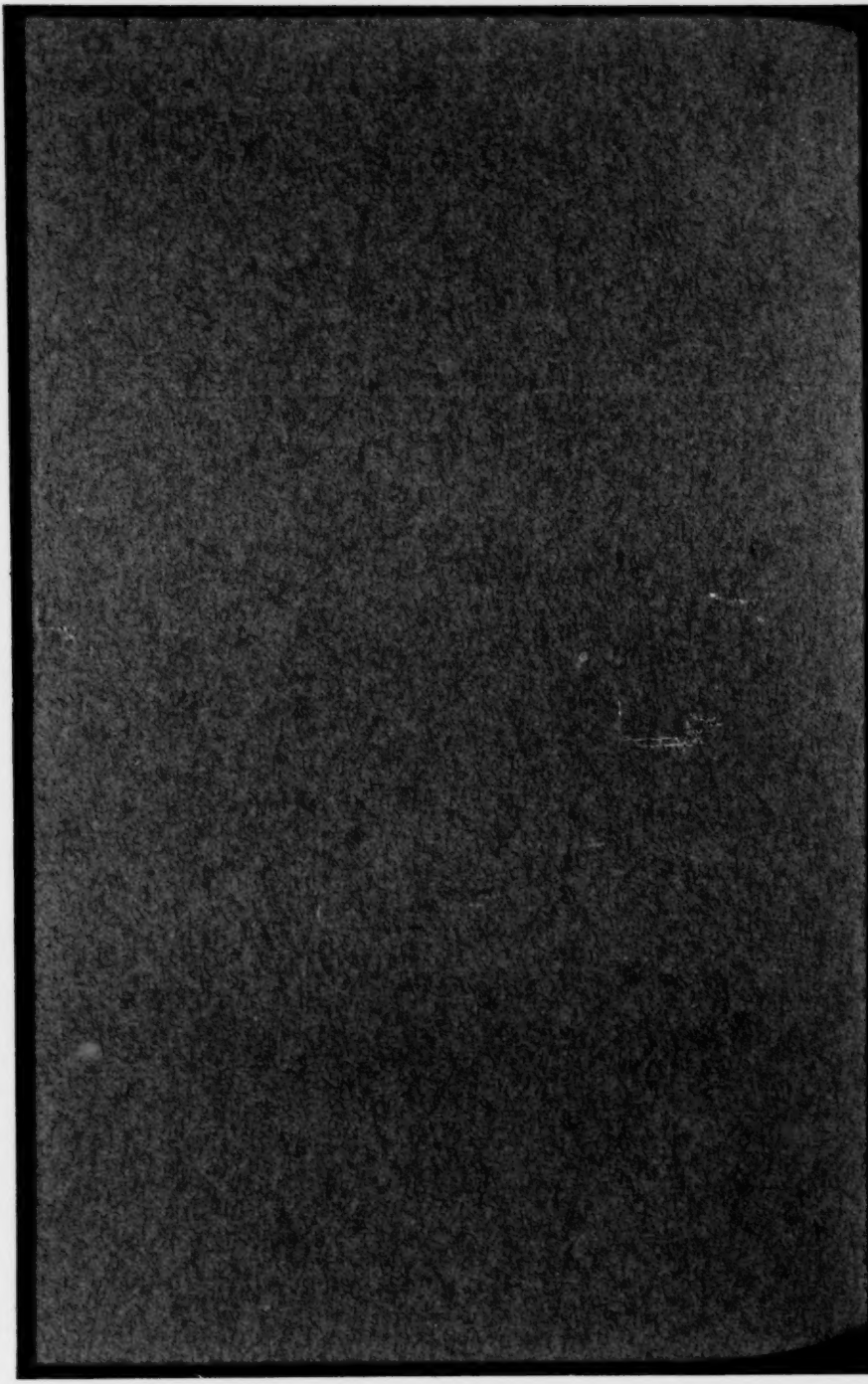
[illegible].

BRIEF IN OPPOSITION TO [illegible] OF CERTIORARI TO THE [illegible] OF APPEALS FOR THE [illegible]

[illegible]

[illegible] G. [illegible]
[illegible]

[illegible]



INDEX

AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM—1945.

No. 983.

AGWILINES, INC., as owner of Steamship *Agwidale* and on behalf of any others interested in said vessel, her use and operation,

Petitioner,

against

Motorship *San Veronico,* her engines, etc.
EAGLE OIL & SHIPPING COMPANY, LTD.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petition seeks a review of the decision of the Circuit Court of Appeals for the Second Circuit, R. 66-69, affirming the decision and opinion of United States District Court for the Southern District of New York, R. 54-57, and final decree thereon, R. 58-60, which confirmed the report of the Commissioner, R. 37-52.

PRINCIPAL FACTS

On June 5, 1943 M. S. *San Veronico,* owned by respondent, collided with S. S. *Agwidale,* owned by petitioner. The *Agwidale* sustained damages and was out of service for 9 days. Five days, 7 hours, 10 minutes of that detention period was for repair of the collision damages, most of the balance was consumed in waiting for the next convoy.

At the time of the collision the *Agwidale* was under a time charter between petitioner and the United States. R. 11-37. Pursuant to the break-down (off-hire) provisions of Clause 4 of that charter, R. 19-20, the United States paid to petitioner the sum of $7,725.65 as charter hire with respect to the detention period. R. 9-10. That payment consisted of one-half the charter rate for the repair period of about five days and full charter hire for the balance of the period of detention.

All items of damages sustained by petitioner with respect to the *Agwidale* were agreed except the one disputed item here involved, viz., the amount of money which petitioner is entitled to recover for detention of the *Agwidale.*

The parties agreed that petitioner was entitled to recover 85% of its *provable* damages and interlocutory decree to that effect was entered on consent of respondent. R. 5.

DECISION BELOW

Respondent conceded from the outset that with respect to detention damages of the *Agwidale,* it was liable to petitioner for the agreed percentage of the sum of $3,457.03, consisting of $3,216.91 charter hire not received with respect to the repair period, and $240.12 for fuel and water consumed by the vessel during the repair period and paid for by petitioner. R. 10.

The claim of petitioner as to the disputed item is, in addition to all other damages agreed, for such sum as will give petitioner the agreed percentage of the sum of $10,942.56 for 9 days' loss of use, measured by the full charter rate, there being no other evidence as to the value of the loss of use, and in addition, the expenses paid by the time charterer.

Respondent contended throughout, and its contention was sustained below, that petitioner could not recover the amount of charter hire received from the United States as time charterer of the *Agwidale*, nor the amount of expenses paid by the time charterer.

The issue was resolved against petitioner both by the Commissioner appointed by the District Court, by the District Court in affirming the Commissioner's report, and by the Circuit Court of Appeals for the Second Circuit.

It was held throughout that petitioner's provable damages with respect to the disputed item should be limited to its *actual pecuniary loss*, viz., the amount of charter hire with respect to the repair period *not* received from the United States by reason of the provisions of Clause 4 of the Time Charter, $3,216.91; and fuel and water paid for only by petitioner during the repair period, $240.12, a total of $3,457.03, all as conceded from the beginning by respondent.

QUESTION

The sole question on this application is whether a shipowner who has transferred the use of his vessel to another by time charter at a specified rate of charter hire, is nevertheless entitled to recover at the full charter rate for detention of the vessel, regardless of the amount of charter hire actually received with respect to the detention period, with the time charterer's expenses added.

BASIC PRINCIPLES

By a contract of time charter the owner transfers to the charterer the right to use the vessel and is thereafter not interested in whether or not the vessel is used at all. It follows that his only interest is in the receipt of the amount of charter hire which the time charterer has agreed to pay to the shipowner for the right to use the vessel; and that only in respect of time charter hire and direct expenses does the shipowner sustain any damages whatever if the use of the vessel is interrupted in consequence of collision.

> *F. A. Tamplin S. S. Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.*, (1916), 2 A.C. 397, 426;
>
> *N. S. Byonnes & Son, etc.* v. *United States*, (SDNY,1923) 298 Fed. 123.

The time charterer of a vessel has not any property right in, interest in, nor possession of, the vessel. He has nothing but a contract right to the use of the carrying capacity of the vessel.

> *Robins Dry Dock & Repair Co.* v. *Flint, et al.*, (1927) 275 U.S. 303.

The payments of charter hire made by the United States to petitioner were not payments under a contract of insurance, nor were they in the nature of a contribution, gratuity or gift with respect to a loss. Thus all cases which hold that a tort feasor must respond in full without benefit of insurance payments, gratuities or gifts do not apply. Cases in that class are relied on by petitioner, both in petition and brief, as follows:

> *The Propeller Monticello* v. *Mollison*, (1854) 17 How. 152;

National Labor Relations Board v. *Marshall Field & Co.*, (CCA7,1942) 129 F.(2d) 159; aff'd. *per curiam, Marshall Field & Co.* v. *Board*, (1943) 318 U.S. 253;

Overland Construction Co. v. *Sydnor*, (CCA6, 1934) 70 F.(2d) 338;

McCarthy v. *Palmer*, (CCA2,1940) 113 F.(2d) 721, certiorari denied, *Palmer, et al.* v. *McCarthy*,(1940) 311 U.S. 680;

Pool Shipping Co. Ltd. v. *United States*, (CCA2, 1927) 33 F.(2d) 275.

The distinction is between a payment which *prevents* a loss and a payment which *reimburses* a loss. The whole question turns on whether or not the payment received from the third party is one of indemnity, collateral contribution or gratuity with respect to a loss. If it is, the payment does not affect the plaintiff's claim against the tort feasor. Otherwise, the plaintiff does not suffer any loss to the extent of such payment.

This was specially recognized in a case heavily relied on by petitioner, *National Labor Relations Board* v. *Marshall Field & Co.*, (CCA7,1942) 129 F.(2d) 169, 172; affirmed *per curiam*, *Marshall Field & Co.*, v. *Board* (1943) 318 U.S. 253. There the decision below, approving the Board's order directing that the employees recover their wages lost during the period of discriminatory discharge less net earnings, pointed out the distinction between earnings and unemployment insurance benefits, and held that the latter did not affect the claim. This Court affirmed that decision. See also,

Drinkwater v. *Dinsmore*, (1880) 80 N.Y. 390, 392;

Clarke v. *Eighth Ave. R. R. Co.*, (1924) 238 N.Y. 246, 253;

Riggle v. *Jackson et al.*, (1931) 112 Cal. App. 428; *Town of Walden* v. *Clarke*, (1877) 50 Vt. 383.

The District Judge correctly pointed out that the amount of charter hire paid by the United States to petitioner was not a payment of insurance; that it was fixed by agreement between the parties beforehand and had no relation to the actual damages or to their cause. R.56.

Unlike an insurance payment or a gratuity with respect to the loss, the reduced amount of hire paid, (being part of the full hire which would have been due if the vessel had not been disabled) was payable at all events, collision or no collision.

NATURE OF THE CLAIM

The original libel was filed, and sought recovery, by Agwilines, Inc., as owner of the Steamship *Agwidale* and *on behalf of any others interested in said vessel, her use and operation.* R.2-4.

But as the case developed and the effect of the decision of this Court in *Robins Dry Dock & Repair Company* v. *Flint et al.*, (1927) 275 U.S. 303 (hereafter referred to as the *Robins* case) became clear, petitioner straddled the issue, as reflected in the prevailing opinion below. R.67-68.

Thus, petitioner has been careful to keep away from any definite statement as to whether this is a claim of the shipowner in its own right, or a representative claim by the shipowner on behalf of the time charterer.

In either event the claim is invalid.

If the claim is made in its own right as shipowner, petitioner did not sustain any damages by loss of use of the *Agwidale*, nor by the charterer's expenses. Petitioner, as shipowner, was not entitled to the use of the vessel,

having transferred it to the United States by time charter. The observations of the prevailing opinion below, R.67-68, on this subject were not questioned in the dissenting opinion, nor are they contested in the petition. The physical damages, the expenses paid by petitioner pursuant to the charter, and petitioner's loss of charter hire by detention of the vessel, all as conceded and allowed below, constituted the only damages which petitioner sustained by reason of the collision.

If the claim is maintained by the shipowner on behalf of the time charterer, for the loss of use of the vessel as put in petitioner's brief at page 17, and for charterer's expenses, the decision of this Court in the *Robins* case is a complete answer. The time charterer has no footing for any such claim. It should not be necessary to argue that a representative action cannot be maintained by one party on behalf of another, where that other has not any right of action at all.

It is clear that if petitioner recovers what it now claims, it will have to pay the money over to the United States as time charterer. No matter what petitioner may contend in legal theory, this claim, as shown by the presence of Government counsel both below and on this petition, is actually by and for the benefit of the United States as time charterer. The time charterer is trying to get around the *Robins* case. It should not be allowed to accomplish indirectly what it cannot do directly.

Petitioner attempts to distort the scope and effect of the *Robins* decision. It is suggested that if the shipowner in the *Robins* case had maintained the claim for the value of the loss of use of the vessel, as later claimed by the time charterers, it could have succeeded. But that contention misses the point that if the charterer had no footing to make the

claim, surely no one else could maintain it successfully on his behalf; and there is not a word in the *Robins* decision which indicates that the charterer's claim was invalid simply because the owner had given a release to the shipyard when the owner's claim was settled. The remarks of Mr. Justice Holmes, stressed at page 13 of petitioner's brief, and by the dissenting opinion below, were not a dictum that if the shipowner had brought such a claim it could have recovered, but merely rejected an unsound contention, as shown by the language which followed. 275 U.S. at p. 309.

At page 12 of petitioner's brief there appears to be a feeble suggestion that the *Robins* case can be distinguished from *Elliott Steam Tug Company, Ltd.* v. *The Shipping Controller* (1922), 1 K.B. 127, because the *Elliott* case spoke of a "wrong" done to a charterer whereas the *Robins* case was brought as a case of "contract and damage." This contention was first made before the Commissioner, later abandoned, and is here resurrected. It is hard to follow because the word "damage" would include whatever claim the injured party had in tort. And in any event Mr. Justice Holmes, in the *Robins* case, thought the *Elliot Steam Tug* case applied because he cited it, and paid no attention to the form of the action. After his statement of the case he said, 275 U.S. at page 308:

> "* * * But as the case has been discussed here and below without much regard to the pleadings, we proceed to consider the other grounds upon which it has been thought that a recovery could be maintained. * * *"

I. THE LAW IS SETTLED.

The legal principles which controlled the decision below are thoroughly established. The decisions of this Court, of the Circuit Courts of Appeals and of the English courts have uniformly laid down the applicable rules.

The proper measure of the damages sustained by a shipowner for detention of his vessel due to collision is the amount of his actual pecuniary loss.

The Potomac, (1881) 105 U.S. 630;

The Conqueror, (1896) 166 U.S. 110,133;

Brooklyn Eastern District Terminal v. *United States (The Integrity)*, (1932) 287 U.S. 170;

The North Star, (CCA2,1907) 151 Fed. 168, 175;

The Winfield S. Cahill, (CCA2,1919) 258 Fed. 318, 321;

Cuyamel Fruit Co. et al. v. *Nedland et al.*, (CCA5,1927) 19 F.(2d) 489, 493;

Newtown Creek Towing Co. v. *City of New York (The Golden Age)*, (CCA2,1928) 23 F.(2d) 486;

Standard Oil Company of New Jersey v. *Glendola S. S. Corporation (The Glendola)*, (CCA2,1931) 47 F.(2d) 206, 208, certiorari denied, 283 U.S. 857;

New Jersey Shipbuilding & Dredging Co. v. *James McWilliams Blue Line, Inc. (The James McWilliams)*, (CCA2,1930) 42 F.(2d) 130,132;

Navigazione Libera Triestina S. A. v. *Newtown Creek Towing Co. (The Isonzo II)*, (CCA2, 1938) 98 F.(2d) 694, 699;

George Nicolaou Ltd. et al. v. *A/B Helsingfors S. S. Co. Ltd. et al. (The Nidarholm)*, (CCA5, 1944) 143 F.(2d) 406;

The time charterer, having not any property right nor interest in, nor possession of, the vessel, has not any footing, apart from statute, to make any claim whatever against a third party who damages the vessel.

Robins Dry Dock & Repair Co. v. *Flint, et al.*, (1927) 275 U.S. 303;

Chargeurs Reunis Compagnie Francaise de Navigation a Vapeur and others (Ceylan) v. *English & American Shipping Company (Merida)*, (C. A., 1921) 9 LL.L.L.R. 464;

Elliott Steam Tug Company, Ltd. v. *The Shipping Controller*, (1922) 1 K.B. 127,135,139-140.

See also *The Federal No. 2* (CCA2,1927) 21 F.(2d) 313.

II. THERE IS NOT ANY GROUND FOR WRIT OF CERTIORARI.

1. No conflict with applicable decisions of this Court.

The cases cited by petitioner as showing such a conflict do not apply. They were cases involving payments to the injured party by way of insurance, or were "spare boat" rule decisions.

The case of *Propeller Monticello* v. *Mollison*, 17 How. 152, 153 involved payment to the injured party under a contract of insurance. It was held that such payments do not affect the claim of the injured party against the tort feasor.

But Petitioner does not here contend that the charter hire payments made by the United States were payments of insurance, nor analogous to insurance payments. Even the dissenting opinion below accepted the point that such payments were not in the nature of insurance, R.72, footnote.

As to *Marshall Field & Co.* v. *Board,* (1943) 318 U. S. 253, as already shown there was the question of the effect of insurance payments (by way of Unemployment Compensation benefits) on the claim of the injured party for damages and this Court reiterated the established rule as to such payments, which does not apply here, because no insurance payment is involved.

Coming to the spare boat decisions cited by petitioner, *The Cayuga,* 14 Wall. 270, and *The Favorita,* 18 Wall. 598 should be regarded as qualified by the later decision of this Court in *Brooklyn Eastern District Terminal* v. *United States* (*The Integrity*), (1932) 287 U.S. 170.

Petitioner has therefore failed to show any conflict whatever between the decision below and decisions of this Court. The weakness of the petition in that respect is clearly recognized by the opening sentence of item 2, page 5 of the petition under the same heading.

2. No important question of Federal law.

Petitioner endeavors to make out that the decision below resolves an important question of Federal law which has not been but should be settled by this Court. It overlooks two points:

1.—that the question here presented is not one of Federal law, but only one of general law of damages. See cases cited at page 14 of petitioner's brief.

2.—that the principles have already been settled by the decisions of this Court.

The Potomac, (1881) 105 U.S. 630;
The Conqueror, (1896) 166 U.S. 110,133;
Brooklyn Eastern District Terminal v. *United States,* (*The Integrity*), (1932) 287 U.S. 170;

Robins Dry Dock & Repair Co. v. *Flint, et al,* (1927) 275 U.S. 303.

The *Robins* case is in accord with English law. *Chargeurs Reunis etc.* v. *English & American Shipping Company,* (C. A., 1921) 9 Ll.L.L.R. 464.

Under this heading petitioner strives for a "clarification" of the *Robins* decision. It does not need any clarification. The fundamental principles there announced and the cases therein cited are unmistakably plain. What petitioner really seeks is to have this Court change the law announced in the decisions above cited. That was recognized by Circuit Court Judge Learned Hand in the prevailing opinion below, R. 69, with a forceful reference to the decision of the English Court of Appeal in the *Chargeurs* case above cited, on facts similar to the case at bar, and to the same effect as the decision below.

3. No conflict with the decisions of another circuit court of appeals on the same matter, nor with the weight of authority.

In a final effort to work out some ground for this petition, petitioner reaches out to unrelated decisions in other circuits and endeavors to make a showing of conflict. *S. H. Kress Co.* v. *Bullock Shoe Company,* (CCA 5,1932), 56 F. (2d) 713 held that the owner of premises damaged by negligence of the defendant was entitled to recover regardless of the fact that the lease on the premises provided for continuing rent without obligation to rebuild. As the action was for damage to the plaintiff's building, (not for loss of rents, which would be parallel to the present case), the Court held, and could hardly otherwise have held, that the provisions of the lease had nothing

to do with the plaintiff's recovery for physical damage to the building. The *Kress* case could apply here only if respondent argued, which it does not and never has, that the payments of charter hire in the present case applied to petitioner's claim for physical damages of the *Agwidale* and expenses incidental thereto.

Next is the decision in *Chicago, etc. Transit Company* v. *Moore*, (CCA6,1919) 259 Fed. 490, certiorari denied, 251 U.S. 553. As petitioner cites page 505 of that decision, we understand that petitioner refers to the claim of the Woodfield sisters, apparently adults. There was a claim for medical and housekeeping expenses incurred by libelants during illness. Those items had been paid by parents of libelants. Apparently respondent sought to defeat recovery on the ground that libelants had not sustained damages in that respect. The authorities therein cited show that the court regarded the payments as gratuities. We have already shown the distinction between cases involving insurance or gratuity payments, and the case at bar.

Petitioner's brief in support of the petition goes further on the subject of conflict between the circuits, and adds citation of further insurance cases. Such cases have already been noted, *ante*, page 5.

III. PETITIONER CONFUSES THE ISSUE.

Petitioner fails to cite a single decision, involving the measure of damages for loss of use of property, at variance with the decision below. It keeps carefully away from the overwhelming body of law cited *ante*, pages 9-10, fixing the proper measure of damages sustained by a shipowner for detention of his vessel due to collision, i.e., the rule of actual pecuniary loss.

Much stress has been laid in the petition, page 6, and petitioner's brief, page 15, on Restatement, Torts, Section 920 (e). There is not and never has been any dispute as to the principles contained in that section of the Restatement. Respondent's position was below, and is here, that the doctrine there announced does not apply to this case because here no question of insurance nor of collateral contribution is involved. Further, the restatement refers to a situation in which "his (the plaintiff's) things are tortiously destroyed". It has been shown that the only party who has suffered any loss of use of the *Agwidale* was the time charterer, not the shipowner, and that petitioner has been made whole for damage to, and detention of, his property.

In this connection the basic weakness of petitioner's position is revealed by the fact that although the petition and supporting brief apparently follow the dissenting opinion below, petitioner is unable to agree with the dissenting judge as to the true incidence of loss. Compare the concluding paragraph of petitioner's brief, where it is clearly stated that it is the charterer who has lost the complete use of the vessel, with the concluding paragraph of the dissenting opinion, where it is just as clearly stated that it is "the prudent and provident shipowner" who is penalized. These contradictory statements demonstrate the utter lack of foundation in petitioner's theory of the case.

Throughout the petition and petitioner's brief and in the dissenting opinion below, there runs the notion that somehow or other petitioner is entitled to "full damages" or "complete compensation". But the whole question is as to what constitutes "full damages" and "complete compensation". On the authorities cited the amount of damages conceded by respondent and stipulated and allowed below

constitute full damages and complete compensation to petitioner because they made good petitioner's actual pecuniary loss. As to the loss of the vessel's use and expenses which the charterer suffered, there is not any legal basis for a claim. Therefore petitioner cannot maintain such a claim on the charterer's behalf.

CONCLUSION.

The petition for writ of certiorari should be denied.

Dated, New York,
April 12, 1946.

Respectfully submitted,

EDWIN S. MURPHY,
Counsel for Respondent.

HELEN C. CUNNINGHAM,
of Counsel.